92-2047

No.

Supreme Court, U.S.
FILED
JUN 23 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

Supreme Court, U.S.
FILED
JUN 23 1993
OFFICE OF THE CLERK

October Term, 1992

GLENN VALENTINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

MICHAEL A. GROSS
Attorney for Petitioner
611 North 10th Street
Third Floor
St. Louis, Missouri 63101-1254
(314) 421-0266

QUESTIONS PRESENTED FOR REVIEW

1. Whether it was erroneous to permit joinder of and refuse to sever charges that a defendant had possessed and intended to distribute approximately four grams of heroine and four grams of cocaine with charges that the same petitioner had possessed and intended to distribute approximately 123 grams of cocaine nine months later, when the evidence of distributive intent was substantially weaker with respect to the former charges than with respect to the latter and the various investigating and arresting police officers testified that there had been no connection between the two events.

2. Whether the opinion of this Court in *Franks v. Delaware*, 438 U.S. 154 (1978), required either an evidentiary hearing or an order quashing a search warrant when evidence at trial tended to establish a police officer had deliberately or recklessly supported the warrant application with false statements regarding the presence of a known drug dealer at the premises to be searched.

LIST OF PARTIES

The parties to the proceeding in the United States Court of Appeals were the United States of America and Glenn Valentine.

TABLE OF CONTENTS

	Page
Questions Presented for Review	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iv
Reported Opinion	1
Statement of Jurisdiction	1
Constitutional Provisions and Rules Involved	2
Statement of the Case	3
A. Investigations and Arrests	3
B. Procedural History	5
C. Court of Appeals Opinion	6
(i) Severance Issue	7
(ii) Search Warrant Issue	7
Reasons for Granting the Writ	8
I. The lower courts erred in rejecting petitioner's contentions that the first two and last two counts of his indictment were improperly joined and that	

Contents

Page

severance should have been granted to avoid undue prejudice even if joinder initially was proper. The writ of certiorari should be allowed so that this Court may review widespread inconsistency and uncertainty regarding the application of and inter-relationship between Rules 8 and 14. 8

II. The lower courts erred in refusing to quash a search warrant after petitioner had adduced compelling and uncontroverted evidence that the basis of the underlying affidavit — observation of a known drug dealer at the premises to be searched, which was the only substantial corroboration of an informant's tip regarding drug sales to occur during several weeks of investigation — had been falsified intentionally or through reckless indifference toward the truth. Allowing the writ of certiorari would enable this Court to revisit its decision in *Franks v. Delaware*, 438 U.S. 154 (1978), and clarify proof requirements and the scope of that opinion. 13

TABLE OF CITATIONS

Cases Cited:

Bruton v. United States, 391 U.S. 123 (1967) 11

Franks v. Delaware, 438 U.S. 154 (1978) .....i, 13, 14, 15

Johnson v. United States, 333 U.S. 10 (1946) 14

Contents

Page

United States v. Carter, 475 F.2d 349 (D.C. Cir. 1973) ... 11

United States v. Foutz, 540 F.2d 733 (4th Cir. 1976) 10, 11, 12

United States v. Koen, 982 F.2d 1101 (7th Cir. 1992) 10

United States of America v. Glenn Valentine, 984 F.2d 906 (8th Cir. 1993) 1, 7, 9, 14

United States v. Rigghianti, 527 F.2d 586 (9th Cir. 1975) 11

Statutes Cited:

18 U.S.C. § 924(c)(1) 5

21 U.S.C. § 841(a)(1) 5

28 U.S.C. § 1254 2

28 U.S.C. § 1291 6

United States Constitution Cited:

Fourth Amendment 2, 13

Fourteenth Amendment 2, 13

Contents

Page

Rules Cited:

Federal Rules of Criminal Procedure:

Rule 8 ..... 5, 9, 10, 11

Rule 8(a) 2

Rule 14 ..... 3, 5, 9, 10, 11

Other Authorities Cited:

1 C. Wright and A. Miller, Federal Practice and Procedure § 143, p. 491 (2nd ed. 1982) 9, 12

74 Yale L. Jour. 553 (1965) 11

APPENDIX

Appendix A — Order Denying Petition Dated March 25, 1993 ..... 1a

Appendix B — Decision from the United States Court of Appeals for the Eighth Circuit Filed January 26, 1993 ..... 2a

Appendix C — Order of the United States District Court, Eastern District of Missouri Filed January 31, 1992 ... 12a

No.

In The

Supreme Court of the United States

October Term, 1992

GLENN VALENTINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

REPORTED OPINION

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *United States of America v. Glenn Valentine*, 984 F.2d 906 (8th Cir. 1993).

STATEMENT OF JURISDICTION

The United States Court of Appeals entered its judgment on January 26, 1993. That court refused to rehear this case in an order dated March 25, 1993. This Court has jurisdiction to review the

judgment of the United States Court of Appeals in this case pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

(i) U.S. Const. Am. IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

(ii) U.S. Const. Am. XIV § 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(iii) Fed. R. Crim. P. 8(a):

> Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each

> offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(iv) Fed. R. Crim. P. 14

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

STATEMENT OF THE CASE

A. Investigations and Arrests

On December 17, 1990, two police officers named Ehrhard and Lachenicht began surveillance of a house in St. Louis, Missouri. (T. 36) A confidential informant had told Ehrhard that a man named Henry was selling drugs in the building. (T. 35-36, 86) Two days later, satisfied that the information was accurate, the policemen obtained a search warrant and entered the house. (T. 39-40)

Ehrhard and Lachenicht found approximately 10 people inside the residence. (T. 54) They arrested the petitioner, Glenn Valentine, after finding approximately four grams of heroine and four grams of cocaine in his pocket. (T. 71) No other arrests were made. (T. 54-55) No evidence suggested that Valentine and Henry were the same person.

Almost nine months later, two other police officers named Hecht and Grace began a surveillance of another house in St. Louis. (T. 27, 103) A confidential informant had told Hecht that drugs were being sold in that building. (T. 104) Lachenicht and Ehrhard were not involved in the latter surveillance. (T. 107) Neither Hecht nor Grace consulted with either of the other officers regarding the suspected drug selling or the surveillance. (T. 107-108)

After several weeks of surveillance, Hecht applied for a search warrant. (T. 104) In the affidavit which supported his warrant application, Hecht swore that he had seen a drug dealer named Antoine Sanders at the building. He mentioned Sanders seven times in the course of the affidavit.

At trial, Hecht testified during direct and cross examination that he and Grace had begun to watch the house at the beginning of September, 1991, and that they had seen Sanders on the property at that time. (T. 105, 143) He stated they had not seen Sanders at the house on any other occasion. (T. 143)

Hecht admitted later in his cross examination that he had participated in Sanders' arrest on August 19, 1991. (T. 148-149) A record custodian from the St. Louis Police Department then confirmed that Hecht and Grace had arrested Sanders on that date. (T. 249) A second record custodian, from the St. Louis Sheriff's Office, produced documents which established that Sanders had remained in custody until September 19, 1991. (T. 254) Hecht

testified that he could not explain this discrepancy. (T. 149) The Government made no attempt to rehabilitate him as a witness or clarify his testimony regarding the drug dealer Sanders' purported presence at the house.

Hecht and Grace found the petitioner Valentine inside the house when they executed the search warrant. (T. 104) They reported having found approximately four grams of cocaine in his pocket and approximately 119 grams of cocaine — together with a cutting agent, a substantial amount of cash, and a loaded revolver — in a safe. (T. 28)

B. Procedural History

Valentine was charged by indictment in the United States District Court for the Eastern District of Missouri. The indictment consisted of four counts charging three violations of 21 U.S.C. § 841(a)(1) and one violation of 18 U.S.C. § 924(c)(1). Count I of the indictment alleged that on December 19, 1990, Valentine had possessed 3.40 grams of cocaine with the intent to distribute it; Count II alleged that on the same date he had possessed 4.26 grams of heroine with the intent to distribute it; Count III charged that on September 28, 1991, he had possessed 119 grams of cocaine with the intent to distribute it; and Count IV charged that on the latter date he had used a firearm in connection with the drug offense described in Count III.

Valentine challenged the propriety of joining Counts I and II with Counts III and IV in a motion filed prior to trial. The motion was filed pursuant to Fed. R. Crim. P. 8 and 14. Valentine alleged that the offenses charged in the first two counts were not of the same or similar character as those charged in the final two counts, that the former charges were not based on the same act or transactions as the latter, and that the conduct charged in the first two counts was not — and was not purported to be — part of a

scheme or plan embracing the conduct charged in the last two counts.

The district court adopted a Magistrate's recommendation that the motion be denied. The recommendation was based on a finding that the offenses charged in Counts I and II were of a character similar to that of the offenses charged in Counts III and IV.

Valentine also moved to quash the search warrant which had been issued pursuant to Officer Hecht's affidavit. (T. 367-368) The motion was made after evidence had been adduced that Hecht could not have seen Antoine Sanders at the surveillance site at any time near September 1, 1991, because of Sanders' imprisonment between August 20, 1991, and September 19, 1991, and that Hecht and Grace actually had effected Sanders' arrest during August. (T. 367-368) Valentine pointed out in his motion that the affidavit depended upon repeated allegations of Sanders' presence at the surveillance site for a probable cause finding, and that Hecht had testified that Sanders was only seen at the site at the beginning of September, 1991. The motion was denied. (T. 369)

A jury found Valentine guilty of all four counts. He was sentenced to imprisonment for almost 27 years.

C. Court of Appeals Opinion

Valentine appealed to the United States Court of Appeals for the Eighth Circuit. The jurisdictional basis for his appeal was 28 U.S.C. § 1291. He raised several issues, including claims that the district court had erred in permitting the joinder of Counts I and II with Counts III and IV and refusing to sever those counts from one another, and in declining to quash the search warrant which had been issued pursuant to Officer Hecht's affidavit. The court of appeals rejected his arguments and affirmed the judgment of the

District Court. *United States of America v. Valentine*, 984 F.2d 906 (8th Cir. 1993).

(i) Severance Issue

Valentine argued that neither the indictment nor the evidence suggested that the alleged possession of relatively small quantities of cocaine and heroine in a house full of people during December, 1990, was an offense similar to the alleged possession of 119 grams of cocaine in an otherwise unoccupied house during October, 1991. He pointed to police testimony that there had been no connection between the two investigations and arrests. Finally, Valentine noted that an expert witness for the Government had made reference to evidence pertinent to all four counts in support of his opinion that Valentine had been trafficking in drugs, and that counsel for the Government had made similar references in his closing argument. (Brief of Appellant at 18-19).

The court of appeals concluded that evidence pertinent to each arrest "would be admissible in separate trials" to demonstrate "motive, intent, or common sheme or plan," and that the district court thus had not abused its discretion. *United States of America v. Valentine, supra*, 984 F.2d at 910 .

(ii) Search Warrant Issue

Valentine argued that the district court had erred in refusing to quash the search warrant after hearing uncontroverted evidence that Officer Hecht had arrested Antoine Sanders some two weeks prior to Sanders' purported appearance at the surveillance site, and that Sanders had remained in custody until some eighteen days later. (Brief of Appellant at 5-9). The court of appeals concluded that Hecht "might have . . . incorrectly identified the date of the observation" and that the affidavit was otherwise sufficient to establish probable cause. *United States of America v. Valentine, supra*, 984 F.2d at 909.

After the opinion of the court of appeals had been filed, Valentine requested a rehearing by the panel or by the entire court. The court denied his request.

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURTS ERRED IN REJECTING PETITIONER'S CONTENTIONS THAT THE FIRST TWO AND LAST TWO COUNTS OF HIS INDICTMENT WERE IMPROPERLY JOINED AND THAT SEVERANCE SHOULD HAVE BEEN GRANTED TO AVOID UNDUE PREJUDICE EVEN IF JOINDER INITIALLY WAS PROPER. THE WRIT OF CERTIORARI SHOULD BE ALLOWED SO THAT THIS COURT MAY REVIEW WIDESPREAD INCONSISTENCY AND UNCERTAINTY REGARDING THE APPLICATION OF AND INTER-RELATIONSHIP BETWEEN RULES 8 AND 14.

Glenn Valentine was arrested for being in possession of a relatively small quantity of heroine and cocaine. The arrest was made during the execution of a search warrant in a home occupied by some eight to ten people. The investigation which culminated in that raid was based upon police officers' belief that a man named Henry was selling drugs on the premises. No evidence suggested that Valentine ever was known as Henry.

Approximately nine months later, a separate investigation resulted in Valentine's arrest while apparently in possession of 123 grams of cocaine, a loaded handgun, and several thousand dollars in cash. Nobody else was present when the second arrest occurred. The evidence of Valentine's intent to distribute drugs to others had been virtually non-existent in the arresting officers' description of the first arrest. It was compelling in the police version of the second arrest.

Valentine nonetheless was charged in a single indictment with having possessed controlled substances with the intent to distribute them in connection with both arrests. The prosecution was able to adduce expert testimony which blurred the distinctions between the two arrests and informed the jury that Valentine indeed had been in the business of selling drugs on both occasions. The prosecution was able to obfuscate the differences between the facts of the two arrests further in its closing argument.

Valentine's challenge to the propriety of joinder in the first instance, and his requests for severance as prejudice became apparent, were rejected. The court of appeals obliquely suggested that the evidence pertinent to each arrest would have been admissible in a trial of the other arrest "to show motive, intent, or common scheme or plan." *United States v. Valentine, supra*, 984 F.2d at 909. The court wholly failed to explain how evidence of possession of four grams of heroine and four grams of cocaine on one occasion would tend to prove a motive, intent, or plan to possess some 123 grams of cocaine for distribution to others nine months later. Such an explanation of necessity would consist of rank speculation.

This appeal is singularly appropriate for review upon certiorari. It illustrates the lower courts' growing disinclination to limit prosecutorial excesses in the joinder of disparate charges against individual defendants through the application of Fed. R. Crim. P. 8 and 14. Several years have passed since two leading commentators remarked on the reluctance of those courts to order severance under the latter rule. 1 C. Wright and A. Miller, Federal Practice and Procedure § 143, p. 491 (2nd ed. 1982). That condition has not changed.

The chilling joinder of charges based upon facts which adequately establish possession but are remarkably lacking in their suggestion of distributive intent, with charges based upon the

possession of some forty times more cocaine, thousands of dollars in cash, and a loaded revolver, makes the point nicely. Examples of similar reticence to enforce Fed. R. Crim. P. 8 and to apply Fed. R. Crim. P. 14 abound in the other circuits.

For example, in *United States v. Koen*, 982 F.2d 1101 (7th Cir. 1992), the Government had joined charges of arson and mail fraud occurring in 1985 with an embezzlement charge which occurred during 1987. It sought to justify joinder by contending that the 1987 embezzlement proved the defendant's financial distress and thus tended to prove his motive to commit the 1985 arson and associated mail fraud. The court of appeals rejected arguments of improper joinder under Rule 8 and abuse of discretion for failure to order severance under Rule 14:

> [W]e cannot say that the commission of the . . . embezzlement must be considered irrelevant in the establishment of either motive or intent for all the other charges.

Id., 982 F.2d at 1111.

In the absence of clear direction from this court, other appellate courts in comparable cases have reversed convictions upon findings that severance should have been ordered. In *United States v. Foutz*, 540 F.2d 733 (4th Cir. 1976), the Fourth Circuit reversed a district court which had allowed the joint trial of two robbery charges. The court of appeals noted that the defendant had had strong alibi evidence in connection with one robbery and had been susceptible to compelling evidence of his guilt in connection with the other. In *United States v. Foutz*, as in the present case, joinder had been premised upon purported similarity in the character of multiple offenses. The court of appeals for the Fourth Circuit pointed out several specific reasons to fear prejudice when joinder depends upon this rationale, including (1) that "the jury

may confuse and cumulate the evidence, and convict the defendant of one or both crimes when it would not convict him of either [were] the evidence properly segregated," and (2) "the jury may conclude that the defendant is guilty of one crime and then find him guilty of the other because of his criminal disposition." *Id.*, 540 F.2d at 736. That court also recognized as an "inevitable consequence" of any joint trial the jury's awareness "of evidence of one crime while considering the defendant's guilt or innocence of another." *Id.*; *See also, United States v. Rigghianti,* 527 F.2d 586, 587 (9th Cir. 1975); *United States v. Carter,* 475 F.2d 349 (D.C. Cir. 1973) (evidence that two robberies had been committed by a man wearing a fur coat and fur hat was insufficient to warrant joinder of the robbery charges).

Nor can the danger which the limitations of Rule 8 and the sanction of Rule 14 address be consigned dependably to a jury charge. In *Bruton v. United States,* 391 U.S. 123 (1967), this Court refused to recognize the universal application of a presumption that juries will adhere to limiting instructions and "segregate evidence into separate intellectual boxes." *Id.*, 391 U.S. at 131; *see also,* Note, Joint and Single Trials Under Rules 8 and 14 of the Federal Rules of Criminal Procedure, 74 Yale L. Jour. 553, 557-58 (1965).

Finally, the argument that joinder of offenses for trial promotes judicial and other economies is of a strictly limited validity with respect to offenses joined on the basis of purportedly similar character. Because the evidence of separate offenses separated in time and bearing significant distinctions generally will not consist of overlapping evidence — as was the case here — the contention of economy simply does not wash. As the Court of Appeals for the Fourth Circuit stated in *United States v. Foutz, supra:*

> [T]he only real convenience served by permitting the joint trial of unrelated offenses

> against the wishes of the defendant may be the convenience of the prosecution in securing two convictions.

Id., 540 F.2d at 736; *see also,* 1 C. Wright and A. Miller, Federal Practice and Procedure § 143, p. 491 (2nd ed. 1982) ("If the offenses arise out of separate and unrelated transactions, there is likely to be little saving in time and money in having a single trial").

The injustice of offense joinder in the present case was fairly palpable: it is inconceivable that the Government's evidence regarding the December, 1990, arrest of Valentine, standing alone, could have resulted in a conviction for possession of drugs with the intent to distribute them; further, the distinction between simple possession of a consumable quantity of two drugs and the possession of a quantity of drugs thirty times greater — together with a large quantity of cash and a loaded handgun — is hardly subtle. This injustice is all the more disturbing because of the greater indulgence of joinder challenges in other circuits. The review of this appeal pursuant to a writ of certiorari would serve a substantial interest of federal criminal justice.

II.

THE LOWER COURTS ERRED IN REFUSING TO QUASH A SEARCH WARRANT AFTER PETITIONER HAD ADDUCED COMPELLING AND UNCONTROVERTED EVIDENCE THAT THE BASIS OF THE UNDERLYING AFFIDAVIT — OBSERVATION OF A KNOWN DRUG DEALER AT THE PREMISES TO BE SEARCHED, WHICH WAS THE ONLY SUBSTANTIAL CORROBORATION OF AN INFORMANT'S TIP REGARDING DRUG SALES TO OCCUR DURING SEVERAL WEEKS OF INVESTIGATION — HAD BEEN FALSIFIED INTENTIONALLY OR THROUGH RECKLESS INDIFFERENCE TOWARD THE TRUTH. ALLOWING THE WRIT OF CERTIORARI WOULD ENABLE THIS COURT TO REVISIT ITS DECISION IN *FRANKS V. DELAWARE*, 438 U.S. 154 (1978), AND CLARIFY PROOF REQUIREMENTS AND THE SCOPE OF THAT OPINION.

This Court held in *Franks v. Delaware*, 438 U.S. 154 (1978), that a search warrant which (a) was obtained by "deliberately falsified allegations" and (b) lacked other content "sufficient . . . to support a finding of probable cause" should be quashed, and that a defendant who made a substantial showing of these two elements was entitled to an evidentiary hearing under the Fourth and Fourteenth Amendments. *Id.*, 438 U.S. at 168, 171-72.

The petitioner in this case made a dramatic showing of prevarication by Officer Hecht. Valentine got neither a separate Franks hearing nor an order quashing the challenged search warrant. This failure represents both an injustice to one criminal defendant and, particularly in view of the Court of Appeals'

remarkable after-the-fact pass at rehabilitating Hecht as a witness, the need for reiteration and clarification of the Constitutional principle enunciated in *Franks v. Delaware, supra.*

In *Franks*, this Court stated:

> The requirement that a warrant not issue "but upon probable cause, supported by Oath or affirmation," would be reduced to a nullity if a police officer was able to use deliberately falsified allegations to demonstrate probable cause, and, having misled the magistrate, then was able to remain confident that the ploy was worthwhile.

Id., 438 U.S. at 168. The particular evil of police disingenuousness in this context was recognized in *Johnson v. United States,* 333 U.S. 10 (1946). Justice Jackson explained that the protection of the Fourth Amendment consists in requiring that conclusions regarding evidence of probable cause "be drawn by a neutral and detached magistrate, instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Id.*, 333 U.S. at 13-14.

The evidence in this case, of course, showed that Officer Hecht had presumed to ensure his success before the magistrate by swearing falsely that a drug dealer he himself had taken to jail was instead hanging out at the premises which Hecht wanted to search. Perhaps more disturbingly, the court of appeals went to surprising lengths to excuse his misconduct, speculating that Hecht's "falsehood" may not have been knowing or reckless, but rather was "likely" to have arisen from "a mistake in recalling the date of his observation of Sanders at the [search site.]" *United States v. Valentine, supra,* 984 F.2d at 909.

Both the Fourth Amendment and this Court's Franks opinion demand more rigorous scrutiny of demonstrably false police affidavits than was given in this case. The present opinion of the United States Court of Appeals for the Eighth Circuit, reasonably read, stands for the proposition that false affidavits given in support of search warrant applications are to be given the benefit of indulgence at the expense of logic and common sense, rather than examined critically in the interest of preserving fundamental rights for all citizens.

This appeal should be reviewed, and the mandate of *Franks v. Delaware* reiterated and clarified, in order to correct both the present inquity and the inappropriate message memoralized in the court of appeals' opinion.

Respectfully submitted,

MICHAEL A. GROSS
Attorney for Petitioner
611 North 10th Street
Third Floor
St. Louis, Missouri 63101-1254
(314) 421-0266

APPENDIX A — ORDER DENYING PETITION DATED MARCH 25, 1993

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2366EMSL

United States of America

Appellee,

v.

Glenn Valentine,

Appellant.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing is also denied.

March 25, 1993

Order Entered at the Direction of the Court:

s/ [illegible]

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B — DECISION FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JANUARY 26, 1993

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 92-2366

United States of America,

Appellee,

v.

Glenn Valentine,

Appellant.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: November 10, 1992

Filed: January 26, 1993

Before WOLLMAN, Circuit Judge, BRIGHT and HENLEY, Senior Circuit Judges.

BRIGHT, Senior Circuit Judge.

Glenn Valentine appeals his conviction on three counts of possession with intent to distribute a controlled substance, in violation of 21 U.S.C. § 841(a)(1) (1988), and one count of use or carrying a firearm during a drug crime, in violation of 18 U.S.C. § 924(c)(1) (1988). Valentine contends the convictions should be

reversed because the district court[1] (1) erred in failing to quash search warrants for buildings at 3048 Thomas and 1124 Tyler; (2) abused its discretion in denying Valentine's motion to sever the offenses; (3) erred in permitting the testimony of the Government's expert witness; and (4) erred in allowing the government to introduce evidence as to actual possession of cocaine not mentioned in the indictment. We affirm.

I.

On December 19, 1990, Glenn Valentine was arrested for possession of controlled substances. He was arrested at 3050 Thomas in St. Louis during the execution of a search warrant for 3048 Thomas. Officers obtained the warrant after surveillance, over the course of several days, of the unnumbered building adjacent to 3050 Thomas. Unbeknownst to the officers, the building was attached to 3050 Thomas and thus corresponded to the same number. The warrant accurately described the target building, but inaccurately identified the number as 3048, which was the clearly identifiable number of the building next to the target.

Upon entering the building, the officers recognized the error in the warrant. They continued their search, climbing the stairs to a second story bedroom, where they encountered Valentine. They searched him, and recovered 3.40 grams of cocaine and 4.26 grams of heroin from his pockets, as well as drug paraphernalia, including empty capsules, baggies, and a triple beam scale from a nightstand.

On September 28, 1991, Valentine was arrested while attempting to leave 1124 Tyler as officers executed a search

1. The Honorable Jean C. Hamilton, United States District Judge for the Eastern District of Missouri, Eastern Division.

warrant. Officers obtained the warrant after periodic surveillance over a six-week period, which was initiated by a tip from a confidential informant. The affidavit supporting the warrant specifically mentioned an alleged drug user and seller, Antoine Sanders. In the search, the officers encountered drug paraphernalia in the kitchen and more paraphernalia and a safe in a bedroom. The officers found approximately four grams of cocaine in Valentine's pockets. Valentine refused to give the combination to the safe, stating " 'I ain't giving you the combination to my safe.' " Trial Tr. at 130. The safe, which was later opened, contained over 119 grams of cocaine, $4,400, and a loaded revolver.

Valentine was indicted on the following counts, with Counts I and II based on the December 1990 incident and Counts III and IV based on the September 1991 incident:

> COUNT I: "did knowingly, intentionally and willfully possessed with the intent to distribute approximately 3.40 grams of cocaine,"
>
> COUNT II: "did knowingly, intentionally and willfully possessed with the intent to distribute approximately 4.26 grams of heroin,"
>
> COUNT III: "did knowingly, willfully and intentionally possessed with the intent to distribute approximately 119 grams of cocaine,"
>
> COUNT IV: "during and in relation to a drug trafficking crime, namely, the possession with intent to distribute approximately 119 grams of cocaine, a Schedule II controlled substance,

did use or carry a firearm, that is, a .38 caliber, Smith & Wesson Chief Model bearing serial number R93298."

Valentine filed pretrial motions covering various issues. A motion to sever Counts I and II from Counts III and IV was denied. Valentine also filed pretrial motions requesting discovery and a Bill of Particulars. The district court denied the Bill of Particulars as moot because the Government indicated it had opened its file to Valentine.

Valentine also made motions regarding various incidents at trial. A Government expert witness, who previously had been identified as a fact witness, testified as to the uses of the recovered drug paraphernalia and the street value of the seized drugs. The Government also introduced evidence regarding the quantity of drugs seized in September 1991 that varied with the quantity charged in the indictment. Finally, the officer who prepared the affidavit supporting the search warrant for 1124 Tyler testified at trial that he observed Antoine Sanders at the location around the first of September, although the officer had arrested Sanders on August 20, and Sanders was incarcerated until September 19. Valentine's motions objecting to the above incidents were overruled.

The trial court rejected the attacks on the search warrants for 3048 Thomas and 1124 Tyler. The jury convicted Valentine on all counts. He received three concurrent 262 month sentences and one consecutive sixty-month sentence, for a total of 322 months, or twenty-six years, ten months.[2] Valentine appeals his convictions on all counts.

---

2. Although the court must affirm Valentine's conviction on all counts, the (Cont'd)

Appendix B

II.

Valentine challenges the validity of the search warrant for 3048 Thomas, contending the warrant failed to identify the target of the search with sufficient particularity. The warrant and the affidavit supporting the warrant identified the target of the search as 3048 Thomas, although in actuality the building was connected to 3050 Thomas and corresponded to the number 3050. Valentine argues that once the officers executing the warrant discovered the error, they should have confined their search to the first floor of the building.

To be sufficiently particular, a search warrant must include enough description so that an officer executing the search can reasonably ascertain and identify the target of the search with no reasonable probability of searching another premises in error. *United States v. Ridinger,* 805 F.2d 818, 819-20 (8th Cir. 1986); *United States v. Gitcho,* 601 F.2d 369, 371 (8th Cir.), *cert. denied,* 444 U.S. 871 (1979). The warrant in question described the target of the search:

> 3048 Thomas, a 2 story, single family brick dwelling with an alluminum [sic] storm door and sits back from the street (there are no numerics on the front, but the residence is 1 door east of 3050 Thomas. [sic]

(Cont'd)
writer notes with dismay the gargantuan sentences mandated by the Sentencing Guidelines. Such draconian sentences bear no relationship to traditional theories of punishment and impose tremendous financial and human costs on society. *See United States v. England,* 966 F.2d 403, 411 (8th Cir. 1992) (Bright, J., concurring).

Appendix B

The warrant describes the target in detail, and the search was confined to the building. Mere technical errors in particularity are not enough to invalidate a search warrant. *See United States v. McCain*, 677 F.2d 657, 660 (8th Cir. 1982). The trial court did not err in failing to quash the search warrant for 3048 Thomas.

III.

Valentine also challenges the validity of the search warrant for 1124 Tyler. He alleges the affidavit supporting the warrant contained a false statement by an officer that was knowingly made or made in reckless disregard for the truth. Officer Hecht testified he observed Antoine Sanders at 1124 Tyler during one of his first surveillances during the six-week surveillance period. He stated his observation of Sanders occurred around early September. But, Hecht had arrested Sanders in late August and Sanders was incarcerated from August 20, 1991 through September 19, 1991.

To invalidate the warrant, the false statement must be made knowingly and intentionally or with reckless disregard for the truth, and it must be necessary to the finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 171-72 (1978). The warrant is invalid only if without the allegedly false statement the affidavit is insufficient to establish probable cause. *Id.*

Hecht's statement regarding his observation of Sanders around the first of September was mistaken and therefore false. However, Valentine has failed to show the falsehood was knowing and intentional, or with reckless disregard for the truth. The surveillance occurred during a period of approximately six weeks, ending on September 27, Hecht might have observed Sanders before or after he was incarcerated and then incorrectly identified the date of the observation. Because Hecht participated in Sanders'

arrest, it seems likely that Hecht made a mistake in recalling the date of his observation of Sanders at the Tyler address. Even without the false statement, the affidavit would be sufficient to establish probable causse. Thus, the trial court did not err in failing to quash the search warrant for 1124 Tyler.

IV.

Valentine contends the trial court abused its discretion in denying his motion to sever the offenses coming out of the two separate searches. He argues he was prejudiced by the prosecutor grouping the offenses in the closing argument to show possession with intent to distribute in both instances.

Under Rule 8(a) of the Federal Rules of Criminal Procedure, offenses may be joined when they "are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." The offenses should have occurred over a short period of time, and the evidence should overlap. *United States v. Shearer,* 606 F.2d 819, 820 (8th Cir. 1979). The evidence from each offense should be admissible in a separate trial for the other offenses. *United States v. Dennis,* 625 F.2d 782, 802 (8th Cir. 1980); *United States v. Bowman,* 602 F.2d 160, 163 (8th Cir. 1979).

Valentine argues the evidence regarding possession of narcotics on two separate occasions nine months apart would not be admissible in separate trials, as it wuld serve only as evidence of bad character prohibited by Fed. R. Evid. 404(b). Similar evidence has been admitted, however, to show motive, intent, or common scheme or plan. *Bowman,* 602 F.2d at 163. Because the evidence would be admissible in separate trials, joinder does not prejudice

Valentine, and the trial court was within its discretion to deny Valentine's motion to sever.

V.

Valentine contends the trial court abused its discretion by permitting the officer executing the first warrant to testify as an expert regarding drug paraphernalia and the street value of the seized narcotics. He asserts he was surprised by the nature of this testimony, in violation of his substantive rights. He further argues the testimony impermissibly addressed the ultimate issue to be decided by the jury.

Valentine filed pretrial motions asking for discovery, but the district court denied the motions after the Government indicated it was adopting an open file policy. Rule 16(c) of the Federal Rules of Criminal Procedure provides the parties having a continuing duty to disclose evidence or material subject to discovery or inspection by the opposing party. Evidence should be excluded when the discovery rules have been violated in a manner that prejudices the defendant's substantive rights. *United States v. Pelton*, 578 F.2d 701, 707 (8th Cir.), *cert. denied*, 439 U.S. 964 (1978).

The Government complied with Rule 16(c) in providing the name of the witness, and the opening statement at trial indicated expert testimony would be used to clarify the role of the items recovered in the search. After the direct examination of the expert witness, Valentine's attorney was given the noon recess to prepare for cross-examination. In these circumstances, Valentine has established neither surprise at the testimony, not prejudice resulting from lack of notification.

Federal Rule of Evidence 704(b) prohibits expert testimony

"as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto." Expert testimony may be used, however, to help the jury understand the evidence or to determine a fact in issue. *United States v. Scavo*, 593 F.2d 837, 844 (8th Cir. 1979). Here, the officer did not testify as to Valentine's mental state, but merely as to the typical use of the paraphernalia seized and the likelihood of intent to distribute based on the quantityof narcotics seized. As the officer did not address Valentine's mental state or condidtion, the district court did not abuse its discretion in admitting the testimony.

VI.

Finally, Valentine contends the trial court erred in admitting evidence as to the actual possession of four grams of cocaine seized in the 1124 Tyler search when the indictment charged only 119 grams, the quantity found in the safe. He argues that, because of this variance, he was surprised and unprepared to defend against a charge of actual possession, as the 119 grams subjected him merely to accusations of constructive possession. As such, he asserts the Government bootstrapped the constructive possession charge to the actual possession charge.

Valentine must show the variance affected his substantial rights and caused him actual prejudice. *United States v. Jagim*, 978 F.2d 1032, 1040-41 (8th Cir. 1992). Because of drug analyses provided to the defense and earlier testimony at trial, Valentine should have known the Government intended to submit evidence regarding the four grams found on Valentine's person. The Bill of Particulars denied by the district court would not have provided Valentine with additional information on the four grams to be addressed by the Government. Further, Valentine's statement "I

ain't giving you the combination to my safe" does provide direct evidence of ownership of the safe and, by inference, the 119 grams inside the safe, thus negating any prejudice by including the four grams in the evidence presented to the district court. Valentine has failed to show the variance affected his substantive rights and caused him actual prejudice, and, thus, the trial court did not err in admitting evidence of the four grams seized from Valentine's person.

For the foregoing reasons, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI FILED JANUARY 31, 1992

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Cause No. 91-0216-CR-7

UNITED STATES OF AMERICA

Plaintiff

vs.

GLENN VALENTINE,

Defendant.

ORDER

This matter is before the court on the pretrial motions of defendant, Glenn Valentine. This matter was referred to United States Magistrate Judge Carol E. Jackson, who has filed her Order and Recommendation. 28 U.S.C. § 636.

After consideration of the matter,

IT IS HEREBY ORDERED that the Order and Recommendation of the United States Magistrate Judge is SUSTAINED, ADOPTED, AND INCORPORATED herein.

IT IS FURTHER ORDERED that the motion of Defendant Valentine to server offenses is DENIED.

IT IS FURTHER ORDERED that Defendant's motion to dismiss is DENIED.

Appendix C

IT IS FURTHER ORDERED that Defendant's motion to quash search warrant is DENIED.

IT IS FURTHER ORDERED that Defendant' motion to suppress statements is DENIED.

IT IS FURTHER ORDERED that the motion of Defendant Glenn Valentine to suppress evidence (statements) is DENIED.

IT IS FURTHER ORDERED that the motion of Defendant Glenn Valentine to suppress evidence (tangible objects) is DENIED.

Dated this 31st day of January, 1992

s/ [illegible]
UNITED STATES DISTRICT JUDGE